Comments on Proposed NR 216

Introduction: This document summarizes the substantive public comments received by the Department of Natural Resources on the proposed revision of ch. NR 216, Wis. Adm. Code. This document does not include general statements of support or opposition. The public comment period ended August 8, 2003.

General Comments on NR 216

1. Comment: We oppose this program. We are not in opposition to complying with the Phase II regulations; on the contrary, we are substantially in compliance with the Phase II regulations and have only minor changes to our programs to come into full compliance. Water quality and storm water management are priorities of all of the MS4's in our area. We are in opposition to program requirements of permit submittal, fees and annual reporting.

We feel this program is an example of highly inefficient government. We question the ultimate goals of the program as it is proposed. The only accomplishment of the program is that all of the EPA defined MS4's will have submitted these permits to the DNR, and will be required to do annual reporting--not for review, but for storage. This has accomplished absolutely nothing, except to fund a paper program through permits paid for by local municipalities. This is unwise, inefficient and certainly not in the spirit of collaboration.

Our proposal is to mimic the process that the DNR has pursued with the Wisconsin Department of Transportation. We propose that The Wisconsin Towns Association, Wisconsin Counties Association and the Wisconsin DNR collaborate on a Memorandum of Understanding in which the municipal MS4's in the State of Wisconsin agree to comply with the EPA Phase II Storm Water Regulations. Once the MOU is signed, a permit is then issued without unnecessary fees. The MOU and permit could have similar provisions for violations and enforcement if the MS4 is not in compliance with the MOU. The DNR can also assist those municipalities who need technical assistance in complying with the MOU. Municipalities can come into compliance with minimal effort and will not waste valuable DNR staff time. This proposal would accomplish the goals of the program in the spirit of collaboration and program efficiency, without creating another confusing and inefficient layer of government regulations.

> **Response:** The goal of the municipal permit program is for municipalities to develop and implement a storm water management plan that is designed to meet measurable goals to minimize pollution discharging from their municipal separate storm sewer systems (MS4). This is not just a paper program. The permits will require each municipality to implement the storm water management plan and they will need to report the effectiveness that they are having in meeting the measurable goals to reduce pollution carried in their MS4. A permit is needed as the tool, which will be used to authorize the storm water discharge that includes the program requirements. Annual reports are needed to summarize the effectiveness of meeting the program requirements. Additionally, federal law also requires that MS4s be regulated under a qualifying MS4 permit and that annual reports be submitted to the DNR for review. Thus, the DNR is unable to eliminate use of permits and the requirement to submit annual reports. The use of an MOU in addition to a permit (or in lieu of a permit) would be even less efficient in creating another step in the process with potentially different conditions, which would then be inconsistent with the rest of the state.

The DNR is delegated by the United States Environmental Protection Agency (USEPA) to administer the National Pollutant Discharge Elimination System (NPDES) storm water permit program. We must implement NR 216 to comply with the federally-delegated NPDES program that includes our authority to regulate not just storm water discharges but also industrial and municipal process and sanitary wastewater discharges. There are over 200 municipalities in Wisconsin that will be required to obtain permit coverage under NR 216 for their municipal storm sewer systems. If we exempted the La Crosse area municipalities from permit coverage, these municipalities would be in violation of federal law. Also, DNR could jeopardize its NPDES delegation authority for the entire NPDES program if we do not require permit coverage where it is required under federal law.

Section 283.33 (9), Stats., requires the Department to charge permit fees to administer the storm water program, as the program is to become self-supported on storm water fees. If the Department did not receive permit fees, the Department would have no resources to provide any assistance or oversight to the storm water program. In response to many requests, the Department did lower the annual permit fees for many municipalities, which will result in the Department having fewer resources to provide assistance to municipalities.

2. Comment: WCA is concerned that the proposed regulations are above and beyond the minimum standards set forth by the EPA. The current condition of Wisconsin's economy coupled with the reduction of funding for the services counties provide on behalf of the State, already places a burden on Wisconsin counties. The proposed regulations would intensify this burden.

WCA strongly supports efforts to control storm water pollution. Without such efforts all levels of government are stranded with the cost of cleaning up the lakes, rivers and streams that make Wisconsin such a special place. However, it is important that such efforts are constructed in a way that provides local units of government with the necessary tools to implement storm water pollution control efforts. In addition, it is important that these efforts include incentives to encourage intergovernmental cooperation.

Until there is more money for local units of government to implement the proposed revisions of NR 216, WCA respectfully requests that the minimum standards set forth by NR 216 are consistent with the federal regulations.

Response: The Department believes that NR 216 follows the minimum federal requirements and the above comment does not identify any specific area where the rule is going beyond the required federal requirements. Therefore, no changes have been made based on this comment.

3. Comment: Regarding the fiscal estimate 2003—who pays cost-revenue difference? Who pays the $250,000 change in costs all due to federal mandate? Who monitors construction and storm sewers?

Response: Costs are born by those owners and operators that discharge storm water. Construction site owners are to monitor themselves with oversight by DNR and municipal authority where the municipality is required by permit to regulate construction sites of 1 acre or greater.

4. Comment: I am concerned that the rules are just being changed because of federal requirements and would like to see more about nonpoint source pollution prevention, especially on the part of municipalities being a part of the permit process. I have a concern with garbage in urban areas getting into our lakes. I don't think our permit process is really taking care of what's going on out there.

> **Response:** You are correct that the rule change is a direct result of a federal regulation change to control point-source storm water pollution. EPA Phase II regulations require smaller construction sites and municipalities to reduce storm water pollution. In accordance with federal law, these regulations can not be used to directly regulate non-point pollution. However, permitted municipalities that take step to address point source storm water pollution will likely work toward non-point pollution prevention as well.
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> Much of the garbage (paper, cans and other large debris) that gets into lakes or along surface waters is not a storm water discharge problem but actually a littering problem. Most municipalities have litter ordinances already and it really is a matter of changing public behavior.

Specific Comments on NR 216

5. Comment: NR 216.001. p. 4, line 4. Purpose. Define what is meant by "maximum extent practicable." I don't see that defined under NR 216.002—Definitions.

> **Response:** The Department has replaced the word “maximum extent practicable” with the word “reduce” in the purpose section. Maximum extent practicable is defined within ch. NR 151 relative to runoff management performance standards.

Definitions

6. Comment: NR 216.002(2). Modify "construction site" to allow discrete activities that are at least 0.25 mile apart to be treated as separate construction sites provided that the area separating the construction sites would not be disturbed. For example, if Great Lakes were to concurrently excavate/maintain two areas along its pipeline system that are more than 0.25 mile apart, each area of excavation would be considered a separate construction site as long as the interconnecting area would not be disturbed. Modifying the definition would be consistent with the EPA guidance, which states that "where discrete construction projects within a larger common plan of development of sale are located at least 0.25 mile apart and the area between the projects is not being disturbed, each individual project can be treated as a separate plan of development or sale provided any interconnecting road, pipeline or utility project that is part of the same common plan is not concurrently being disturbed."

> **Response:** We have incorporated this 0.25 mile separation distance into the definition of “construction site” consistent with EPA guidance.

7. Comment: NR 216.002(13). p. 5., line 7. Infiltration Systems. Suggest deleting "pollutant removal only". If a swale is designed for pollutant removal, it should be credited for infiltration but if it is designed for conveyance only, it should not be credited.

> **Response:** A swale can count as credit toward infiltration where credit is due. However, a swale that has pollutant removal capabilities does not automatically make it classified as an infiltration system. No change made.

8. Comment: NR 216.002(16b). p. 5, lines 20-21. Major Outfalls. Suggest deleting "but not land zoned…" to end of sentence because it is confusing. Is the code saying that if an area is zoned industrial but not being used for industrial activity, it is not considered a major outfall? If so, what about when the area becomes used for industrial activity in the future, then we need to go back and re-define the major outfall at that time?

> **Response:** Yes, the code is saying that an area zoned industrial but not being used for industrial activity is not considered a major outfall. If industrial activity comes into this area, then it will have to be reclassified as a major outfall. No change made.

9. Comment: NR 216.002(19). p. 5, lines 33-34. Outfall. Suggest deleting "or to a storm sewer." If this definition were valid, we would have hundreds of outfalls within municipal boundaries at every inlet to a storm sewer pipe to keep track of.

> **Response:** An outfall can be to a storm sewer system and that is where outfall is defined for many industrial and construction site discharges. Most municipal storm sewer systems will label their outfall when the MS4 discharges into waters of the state. No change made.

Subchapter 1: Municipal Storm Water Discharge Permits

General Comments on Subchapter I

M1. Comment: FMR is concerned about the issuance of general municipal permits for storm water discharge. We request further codification of how the DNR will monitor and enforce these general permits to ensure that there are no local violations of water quality standards in receiving waterbodies. We also feel that, at the minimum, these permits should be tailored to the location of the municipality (urban, rural, etc.) or the receiving waterbody (impaired waters, great lake areas of concern, etc.), and that special consideration and/or more stringent BMPs be applied as appropriate.

> **Response:** The Department does not have the resources to require individual (tailored) permits for all MS4s. A general permit is enforced using the same authority as an individual permit under ss. 283.89 and 283.91, Stats. The Department has the authority to require an individual permit for those MS4s where a general permit does not provide adequate control over permit requirements. The Department's enforcement and monitoring strategy consists of responding to complaints and routine inspections as resources allow.

M2. Comment: Provide additional clarification on how the municipal permit section of this rule applies to counties, including the eligibility for an exemption under NR 216.024.
This was discussed during the rule making process, but remains unclear to many counties. The rule refers to the "urbanized area" definition in the applicability and the exemption sections. Since counties are an overlay jurisdiction to other communities, using this as a trigger for the permit introduces some confusion. For example, if a county highway travels through an "urbanized area", and receives runoff from adjacent communities, the county should not be held responsible for the ultimate discharge from the conveyance system. We would ask that this be clarified in the rule.

Response: Counties are included under the definition of municipality, and therefore are eligible for the exemption under s. NR 216.023. We believe that the definition of "urbanized area" is clear and we are being consistent with federal law. If the county-operated MS4 is located within the urbanized area and it receives runoff from an upstream municipality, it is still required to have permit coverage (unless exempted) and this is consistent with federal law.

M3. Comment: The rule provisions also make it very difficult to obtain an exemption. First we must obtain a waiver from the "urbanized area" definition under NR 216.023, which refers to population "served" by the MS4 (even if most of the MS4 is owned by another community). Then we must meet all the criteria for an exemption under NR 216.024, which again refers to population growth and land uses – usually beyond the county-owned MS4. All this means the county is not sure what they are applying for in the first place. It would be helpful if the rule contained more guidance on what county-owned MS4's may be subject to the permit requirements so we can focus our attention to those areas.

Response: Sections NR 216.023 and NR 216.024 are 2 separate exemption sections and an MS4 might be able to request an exemption under one or the other sections (both do not have to be met). A note was added to clarify this.

M4. Comment: NR 216.024. Remove "non-point source impaired waters" from exemption criteria. We have no objection to additional protection offered to sensitive water resources in the exemption criteria. However, under the draft rule, any discharge to an "impaired water" is not eligible for an exemption. We believe this provision may require very expensive control measures to be installed where they would accomplish very little. We would question the science behind this provision and ask that it be removed.

Response: We have revised this section such that if the MS4 does not discharge a pollutant of concern to the impaired water that the exemption would still be possible.

M5. Comment: It is unclear how or when some of the proposed rule revisions will be applied to communities that are being permitted under the current version of the rule (Phase I). This is important for local budgeting purposes. For example:

a. Does a Phase I community need to incorporate the infiltration provisions of NR 151 into their local storm water ordinance to remain compliant with their permit? If so, by when? Who enforces the provisions before that happens?
b. When is a Phase I community subject to the public informational and educational requirements of the rule revisions?
c. When does a permit expire and the new fees become effective? Most communities at the meeting believed they should be grandfathered under the old fee structure for several years – to be fair about the original group application incentive.

Response: a. A municipality covered by an MS4 permit must abide by the permit conditions in its permit. When its permit is reissued, there will be a compliance scheduled added to adopt and start implementation of an ordinance that includes infiltration requirements.
b. Same response as a.
c. The new fee structure will be effective after the first fee billing following promulgation of the new rule (possibly in May 2004 but more likely in May 2005).

M6. Program Flexibility: We appreciate the Department's many efforts to respond to our request for flexibility in meeting the stormwater requirements in § NR 216.07. We expressed particular concern about the ability of small communities to meet these requirements in a cost-effective manner. The current rule allows flexibility in the application process by allowing the applicant to specify how the local program will "achieve or partially achieve" the objective. In addition, the exemption provisions of § NR 216.07(8) are particularly helpful in providing the flexibility that is critical for smaller communities affected by the rule.

> **Response:** Unfortunately, EPA objected to the exemptions that the Department proposed under s. NR 216.07(8), and therefore, the Department removed these exemptions, as they were not allowed under federal law.

Funding/Fees

M7. Comment: The proposed rule creates a disincentive to municipal collaboration and group permitting. Dane County is one of 19 entities participating in a group storm water discharge permit under the current NR 216. Under the existing NR 216.09, our group of 19 municipalities is able to split the annual permit fee of $10,000 among us; each paying less than $1,000. Each municipality under an *individual permit* in the existing permit fee scheme would have to pay either $5,000 or $10,000 annually. This is a significant incentive for collaboration on a storm water permit, which can also have environmental and workload efficiency benefits both for permittees and for DNR.

Our work in preparing our permit application has been a model for others nationally. There has been a great deal of statewide recognition for our collaborative work, perhaps most visibly from the Wisconsin Extension Community Development Association, which awarded its 2002 Quality of Communication Award for development of our group's Storm Water Information and Education Strategy that we submitted with our storm water discharge permit application last January.

The proposed NR 216.09 establishes a financial barrier to entering into group permits. There is no mechanism for sharing permit fees in the proposed rule, and I predict that most municipalities will seek individual permits and forego the other benefits of group permits. If the revisions to NR 216 are adopted as proposed, when our group permit expires in five years, there will be much less of a financial incentive for us to continue our work together.

In order to encourage the benefits of watershed protection, of workload efficiencies for DNR permit writers and municipal staff and of high quality collaborative work done for permit compliance, I ask that the draft rule be amended. NR 216.09 should be written so that group permitting is financially preferable to individual permitting, regardless of municipal population.

M8. Comment: The current version of the rule contains an incentive to group applications (by watershed) through a reduced fee structure. This has helped encourage intergovernmental cooperation, which is sorely needed in Wisconsin. The proposed revisions remove this incentive. Given that storm water does not recognize political boundaries, and that other efforts to encourage watershed-based storm water planning have had limited success, we ask that the DNR find a way to replace the current incentives for intergovernmental cooperation under this permit.

M9. Comment: We are concerned with the proposed fee schedule—citizens in small communities pay the most on per person basis (Wilson @ 163 = 0.31/person) while Milwaukee

citizens, the largest community, pay the least (0.04/person) Why not a flat, across the board $x/person = more fair.

M10. Comment: I think the lower end of the fee structure could be looked at with the idea of raising those fees and lowering them at the upper end to achieve a balance.

> **Response**: The Department can not afford nor did it feel that it was fair to give such a financial break to municipalities that are covered as co-permittees under an individual permit as opposed to other municipalities covered under a general municipal permit. An argument can be made that all municipalities covered under the same general permit are co-permittees and that they should share one permit fee and then all group/individual permit fees would actually increase because so many municipalities will be covered under a general municipal permit. After considering the options, the Department believes that basing permit fees on population, as opposed to co-permittees or individual versus general permit, is the most equitable method of allocating fees.
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> Section 283.33(9)(b), Stats., directs the Department to establish fees based on costs associated with each type of permit. Larger municipalities are expected to require more Department time in assistance and oversight but this is not expected to be a straight line relationship and that is why the resulting per capita fee for large municipalities is less than that for small municipalities.
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> Whether an individual or a general permit is used to cover a municipality, any municipality has the option of working together with other municipalities in pooling resources to manage permit requirements. The Department has not created a disincentive from permittees working together. The Department has determined that the current method of splitting a permit fee among co-permittees is not an equitable method to municipalities statewide or to the Department providing assistance and oversight. We are proposing a more equitable method of charging fees based on population and relative level of effort the Department expects to provide to smaller versus larger municipalities. If the primary reason that municipalities became co-permittees was to reduce Department permit fees, they were doing so for the wrong reason.

M11. Comment: We object to the increases in fees for the permit. We have a loss of the incentive program in going with the joint permit. We also have increased costs in those permits for meeting the requirements of NR 216 for which we have not received additional funding. That funding is not available to us—we have researched that a number of times. We also note that the fee gives no recognition to water conservative developed communities, even on a per capita basis. A community with curb and gutter development is being charged the same as a community that would have ditches and bio-swales, etc. so there is no incentive within the program.

A statement of $0.15 per capita as the average for the Milwaukee metro area is basically correct. If you take the area into account, the average is $0.11 per capita. Under their plan, communities such as Brown Deer would pay $0.15 per capita, however, the City of Milwaukee would be at $0.04 per capita. Other communities would be at $0.21 per capita, so the range is quite large, even under this schedule. There should be no gradient as far as per capita in setting a limit. It should be based on a straight per capita fee throughout.

> **Response:** A primary objective of the municipal storm water permit is for existing urbanized areas to achieve a 40% control of Total Suspended Solids (TSS) by year 2013 as compared to no controls being applied to the MS4 system and/or area draining to it. A

municipality that has been proactive in putting in storm water management controls such as bio-swales, infiltration, wet detention ponds, etc. will be able to take credit for such measures it still has in operation. See previous response regarding equity of setting municipal permit fees.

M12. Comment: We understand that the Department operates under a statutory requirement in Wis. Stats. § 283.33(9) to recover program costs through annual fees. As a result, the fees associated with municipal storm water permits are substantially higher than fees associated with municipal wastewater permits.

M13. Comment: We have previously communicated with the Department our position on a more reasonable fee structure. We are incorporating those comments by reference and have appreciated the Department's past response to comments.

Response: We have adjusted (lowered) some of the municipal permit fees based on the many comments to reduce MS4 annual permit fees.

M14. Comment: The proposed increase in the Storm Water Permit annual fees from $10,000 to $25,000 is excessive for the following reasons: 1. The City of Milwaukee has an existing Storm Water Permit that meets the proposed NR 216.07 permit requirements. 2. The City of Milwaukee has programs in place that meet the proposed rule changes and would require very little effort for the Department of Natural Resources' staff to justify the rate increase. 3. The City of Milwaukee has been and will be a model for other municipalities in developing their own storm water permit.

Response: The City of Milwaukee is to receive that lower per capita based fee in recognition of these factors.

M15. Comment: We encourage the Department to continue to provide permit review in as cost-efficient manner as possible. Local governments are being asked to do more with less, and the same should be true for state government. In many cases, the Department should be able to rely on the analysis provided by the applicant's engineers and limit or focus its review. For example, the Department is proposing to perform only a limited review of the CMOM reports under revisions to NR 110. In addition, while every community is unique in some respects, the Department should continue to look for ways of streamlining review once it has reviewed several permits for communities of the same size. For example, after reviewing and approving 5-10 permits for communities between 10,000 and 15,000, there should be enough similarity that review time should drop and the Department should be able to provide guidance of what is expected to the remaining communities of that size. We would anticipate that after this program is established, future fee schedules should be able to be reduced.

M16. Comment: We understand that the Department has indicated a willingness to reduce the fees somewhat. We appreciate the progress that has been made on this issue to date. We also acknowledge that the proposed fee structure is fairer for smaller municipalities because it provides more gradations for communities of various sizes. Notwithstanding these points, we are concerned that the proposed annual fees are still too high, especially in the current fiscal environment. Municipalities are facing significant cuts in shared revenue payments from the state beginning in 2004. The Governor has asked municipalities to do more with less and avoid raising property taxes to make up for these cuts. In light of these negative fiscal conditions, we urge the Department to consider further reducing the proposed permit fees. One approach we urge you to consider is to charge a reduced fee for permit renewals.

We encourage the Department to continue to provide permit review in as cost-efficient a manner as possible. The Department should be able to rely on the analysis provided by an applicant's engineers and limit or focus its review of a particular permit application. The Department should continue to look for ways of streamlining review once it has examined several permits for municipalities of the same size. For example, after evaluating and approving 5-7 permits for communities between 2,000 and 3,900, there should be enough similarity between permits that review time is reduced on subsequent permits from communities of that size. The Department should be able to provide guidance to the remaining 11-13 municipalities between 2,000 and 3,900 in population of what is expected. We presume that after this program is established, future fee schedules will be able to be reduced.

> **Response:** We have initiated an improved and more detailed tracking system to evaluate staff time spent on reviewing and administering permit for municipalities, industrial and construction sites. Future fee structures will be based on this analysis.

M17. Comment: We request that the Department include a note to § NR 216.09 to indicate that the fee schedule is designed to meet the requirements of Wis. Stats. § 283.33(9). We do not want there to be any suggestion that the fees imposed here are precedent for the imposition of higher municipal fees elsewhere.

> **Response:** Such a note was added.

M18. Comment: 1. Shorewood's current NR 216 fee is $715 (1/7th of the $5,000 group fee for the North Shore group), 2. Shorewood's proposed NR216 fee based on population (13,724) is $2,500. 3. Approximately ½ of Shorewood's population is served by separated sewer and the other ½ is served by combined sewer. Given this fact, I feel an adjustment should be made and the population number of 6862 should be used to determine the Village's NR 216 Storm Water Permit fee. According to the schedule the fee should then be $1,000.

> **Response:** The Department has revised the proposed fee structure so that fees are based on the population located in an area served by a MS4. Municipalities will not be charged for the population that resides within a combined sewer service area.

M19. Comment: We object to the revised, population-base manner that DNR plans to use for assessing permit fees. Development in most of Caledonia is of a rural nature with rural roadway cross sections using flow retarding grass line ditches for storm water conveyance. Caledonia has recently enacted a conservation based subdivision ordinance to further protect the environment and minimize storm water pollution.

We request that the method of assessing permit fees be based on or give consideration to actual pollutant discharges. As proposed, the new NR 216 fee schedule benefits more concentrated population areas that have developed with curb and gutter streets feeding rapid discharge storm sewer systems, including combine sewer systems with overflows to surface waters. These urban roadway storm water collection systems provide no treatment along the conveyance train, as does our rural systems.

If the fee schedule must be population based, we request that per capita fees be applied unilaterally and eliminate the currently proposed big-city discount for municipalities discharging the most pollution. If the new NR 216 program will average 15 cents per person statewide, make everyone pay their fair-share 15 cents. As proposed, big city residents will pay 4 cents and those of us doing a better job of pollution control will pay 20 cents.

Response: Those municipalities that have grassed swales and other storm water design features already built into their developments will be able to take credit toward meeting the 20% and 40% total suspended solids standards of s. NR 151.13(2)(b), Wis. Adm. Code. Municipalities that have curb and gutter systems that are connected directly to receiving waters without any treatment will need to take additional measures to reduce their storm water pollution. Thus, municipalities that have conservation designs that protect receiving waters will have less to do with regard to complying with their permit as opposed to heavily developed areas.

Basing permit fees on pollutant loadings is not authorized by law, and would result in a difficult process for calculating fees, and measuring pollutant loadings might cost more for municipalities to calculate than the cost of the annual permit fees themselves. Population based fees are preferred since they are considered equitable based on municipal population and the department's costs of program administration associated with municipalities of varying sizes.

M20. Comment: During the period of Oct. 2000 through Jan. 2001, the Upper Fox River Watershed Group, consisting of the Cities of Pewaukee and Waukesha; the Villages of Pewaukee and Sussex; and the Towns of Brookfield, Delafield, Lisbon and Waukesha agreed to prepare a group storm water discharge permit application in fulfillment of the requirements of s. 283 Wis. Stats. and NR 216. (A copy of the cooperative agreement to jointly apply for the storm water discharge permit is attached to the letter.) The DNR staff encouraged the filing of the group permit and has provided a great deal of assistance during the permit process. The SEWRPC acted as facilitator and prepared some of the application materials. The process of preparing the application has been effective and will be completed early next month with the group permit application.

During the deliberations on whether or not to proceed under the group permit application process, one of the factors considered by the community officials was the provision that the annual permit fee of $10,000 would be shared between the eight co-permittees in accordance with the provisions of s. NR 216.09. The proposed revisions to NR 216 would change the annual permit fee structure and require eight individual community fees ranging from $1,000 to $10,000.

Since the communities have proceeded in good faith with the group permitting process, it would only seem fair to have the permit fee basis remain as was set when the communities agreed to that process. An intergovernmental oversight committee involving representatives of all eight communities has been meeting to oversee the permit application preparation. At the July 31, 2003, meeting of that committee, it was unanimously agreed to request that the storm water discharge permit fee structure to the Upper Fox River Watershed Group be maintained as set in the current rules for at least the first five years of the permit. This would be consistent with the indicated intent and requirements of the code on which the communities based their agreement to use the group option for the application process as recommended by your Department.

The Upper Fox River Watershed Group Oversight Committee requests the proposed rules be revised to allow for the continued use of the group permit fee structure since the group application permitting process was initiated and completed under the current rule.

Response: The Department believes that the new fee structure is necessary and is more equitable to municipalities affected across the state than the present fee structure.

Therefore, the DNR believes that the new fee structure should be put into effect as soon as possible.

M21. Comment: Two state grant programs available to help local governments meet state and federal requirements for controlling polluted runoff—Targeted Runoff Management (TRM) and Urban Nonpoint Source Grants—are minimally funded compared to the number of local governments that need financial assistance for the significant cost of implementing the federal regulations.

Education and planning are two essential components to an effective local storm water runoff program. Neither planning nor education programs are supported by the permit fees. Local ordinances can provide limited revenue; however, it is very difficult for local programs to cover actual (planning and education) program costs. We request that DNR, through the NR 216 revision process, provide assistance to local programs in regard to educational programs and planning efforts.

Response: The Department provided a $100,000 urban grant for the implementation of a storm water information and education plan developed by the Madison area municipalities. This plan is available through the Dane County Lakes and Water Commission website at http://www.co.dane.wi.us/commissions/lakes/pdf/stormwater/jointstormwaterpermit.pdf. The Department expects that most municipalities will utilize existing information such as this plan to help them establish an appropriate program for their area. The Department, working with UW Extension, intends to develop and/or identify additional education materials for municipalities to share with their residents and/or businesses.

Specific Comments on Subchapter I

M22. Comment: NR 216.02(1). p. 8, line 23. Why not the 2000 census instead of 1990?

Response: Because federal law locks this date in for Phase I municipalities (those with a population over 100,000). Only Madison and Milwaukee are automatically required to have permit coverage under Phase I federal storm water regulations. If another municipality reaches a population of 100,000 or greater it will not be subject to the federal Phase I regulations.

M23. Comment: NR 216.03(3). p. 13. Many counties are listed in the NR 216 municipality list. Counties own storm water outfalls and roads within many of the affected towns, villages and cities. The code should explain that the towns, villages and cities are not responsible for county-owned facilities within the urban area.

Response: A note was added under the introduction to s. NR 216.02 to clarify this.

M24. Comment: NR 216.02(4). p. 13, line 5. Suggest deleting "exempted from permit coverage" because it is a circular reference (if they are exempted, they do not need to obtain a permit).

Response: This change has been made.

M25. Comment: NR 216.023(3). p. 14, lines 9-10. What is a "physically interconnected MS4"? How do you know if you are or are not contributing to storm water pollution? Take storm water samples?

> **Response:** Physically interconnected means that the MS4 drains into another MS4. Chemical sampling and also modeling and visual observations are all methods that might be used to help determine if pollutants are in the discharge.

M26. Comment: NR 216.023(4). p. 14, lines 11-12. How do we know which pollutants have been identified as causes of impairment for nonpoint source impaired water? What about a list of TMDLs that have been established in the state?

> **Response:** A note was added indicating that impaired waters and associated pollutants causing the impairment is available on the Department's website. A list of TMDLs in currently not on the web so the Department should be contacted to determine if a TMDL has been developed.

M27. Comment: NR 216.024(b). p. 14, line20. 320 acres is too small an area to be used. Suggest using at least 640 acres instead.

> **Response:** The DNR feels that 320 acres is a reasonable land use threshold because it correlates with previous designations of MS4s in southeast Wisconsin. The DNR evaluated many communities in the southeast part of Wisconsin based on the criteria within the current s. NR 216.02(4)(a). The DNR found that municipalities that had less than 320 acres of land uses listed in NR 216.024(b) were those for which the DNR generally did not require municipal permit coverage, but above this level permit coverage was required.

M28. Comment: NR 216.03. p.16, Note line 14. An explanation should be added explaining the differences in an individual versus a general permit versus co-applicants.

> **Response:** The overall goals and general requirements of an individual permit are the same as that of a general permit. An individual permit identifies the specific permittee or co-permittees and it typically includes specific requirements that are appropriate for a particular discharge. A general permit is written so that it is can be used to authorize multiple discharges across the state. It's expected that the MS4 general permit will provide municipalities more flexibility to select their own BMPs that will be implemented to achieve the water quality goals of the program. An individual permit allows the department to tailor the permit to specific discharge requirements where needed.

Subchapter II: Industrial Storm Water Discharge Permits

General Comments on Subchapter II

I1. Comment: While we understand the rational for exempting industries that discharge into a municipal combined sewer system from storm water permits (p. 28, line 18), we feel that this merits closer and more routine monitoring of the municipal sewage treatment authorities and their laboratory procedures on the part of the DNR.

Response: This exemption exists in the current NR 216 and is consistent with federal law. DNR inspection of municipal sewage treatment facilities is not within the scope of ch. NR 216 so no change was made to NR 216 based on this comment. DNR has separate authority for inspections of municipal sewage treatment facilities and the ability to perform more inspections is primarily based on the level of resources available in that program.

I2. Comment: We are concerned about the issuance of a statewide general permit to cover all Tier 1 industrial dischargers where not covered by an industry specific permit or individual permit (p. 29, lines 33-36). We respectfully request more clarification of how the DNR would monitor such a permit to ensure that there is no local violation of water quality standards in receiving waterbodies.

Response: Industrial storm water general permits have been used since 1994 to cover Tier 1 industrial dischargers and this is not changing with the proposed revisions to NR 216. The Department follows up on complaints and performs routine field inspections of industrial facilities to evaluate exposure of material and BMP implementation to minimize storm water contamination.

I3. Comment: While we recognize the lack of funding and staff that plagues the DNR water quality division, we are concerned the Tier 2 industrial facilities never have to submit a report to the DNR (P. 38, lines 16-21), and that Tier 1 industrial facilities do not have to submit reports after 30 months. We feel that income from increased fees could be used to fund some staff oversight of these permits or citizen volunteer training, given that storm water runoff is probably the major threat to our urban waterbodies.

Response: The Department feels that resources would be better utilized by spending more time inspecting the facilities in the field rather than managing and reviewing mandatory paper report submittals. The proposed industrial fee increase is less than a 3% annual increase since 1994 and is not expected to yield additional DNR staff relative to present levels assigned to industrial storm water work. Actually, due to GPR cuts and the significant increase in regulated construction sites and municipalities that will require oversight, there likely will be fewer resources available for industrial facility oversight.

I4. Comment An industry specific general permit (WPDES Permit # WI-0046515-3) is already in place for nonmetallic mining operations, which covers both process and storm water discharges. Our understanding is that the proposed rules are not intended to materially affect the manner in which the nonmetallic mining industry is currently regulated. Further, we understand that the proposed rules are not expected to necessitate changes in the current general permit for nonmetallic mining operations. Based on that understanding, we are commenting for information only.

1. NR 216.30(2). We support this provision relating to permit fee exemption in that it is intended to maintain the zero fee currently applied to internally drained sites operating under a nonmetallic mining general permit. Our concern is that the proposed language does not clearly achieve that objective.

NR 216.30(2) provides the exemption of "facilities that have certified to the department, and the department concurs with the certification of all of the following" (emphasis added). It is unclear what "certified" means in this context. In the general permit, "certification" refers to certification of a Storm Water Pollution Prevention Plan (SWPPP). Using the term in the fee exemption

section of NR 216.30(2) is confusing since the general permit provides that certification is not required for internally drained sites because such sites are not required to submit a SWPPP.

As proposed, the rule could be read to require the submittal of a new separate certification to qualify for the exemption as opposed to recognizing that internally drained sites under the current general permit will continue to be exempt from annual fees. Requiring additional paperwork to be submitted is not necessary since the holder of the WPDES permit has already submitted an NOI identifying the site as internally drained.

2. NR 216.30(2)(b). The language is unnecessarily restrictive in that it requires discharge to a "seepage basin". An engineered seepage basin is just one of several methods of controlling storm water runoff on site. To be consistent with the permit designation of an internally drained site, the determination should be whether storm water is controlled on site as opposed to what prescriptive method is used to achieve the control. Accordingly, we suggest that the fee exemption language in 216.30 simply reference an internally drained site (see suggested modification below).

3. NR 216(2)(c). We also question whether this is necessary. By virtue of the controlling general permit, a site that posed significant concern with respect to sediment movement into surface waters of the state would not qualify as an internally drained site and would therefore not quality for the fee exemption.

Suggested Modifications: Each of the above concerns could be addressed by simply stating that no fee may be charged to WPDES regulated nonmetallic mining operations, which are internally drained. Specifically, we suggest that s. 216.30(2) be modified as follows.
A. Modify 216.30(2) to read: *"Notwithstanding sub. (1), no fee may be charged under this section for facilities whose storm water discharges are regulated under a WPDES permit developed specifically to address discharges from non-metallic mining operations, and such discharges are internally drained."*

Under this proposed language, a Note could be added to explain that "internally drained" means "No off-site discharge—all stormwater that contacts disturbed areas or excavated materials is directed to onsite seepage areas or ponds that are entirely confined and completely retained within the property boundaries of the site"—consistent with the NOI application for nonmetallic mining operations (Form 3400-179).

B. Delete sections 216.30(2)(a), (b) and (c).

> **Response**: We have revised s. NR 216.30(2) to address the concern of additional certification, seepage basin versus internally drained, and have eliminated s. NR 216.30(2)(c). Department concurrence was left in to make it clear that the Department has the authority to decide if a site is or is not internally drained.

I5. Comment: Under the proposed rule, Tier II annual permit fees would increase from $100 to $130, or 30%. While this amount may seem insignificant for an entity that holds one permit, some of our members hold numerous Tier II permits, each covering a different nonmetallic mining site. Consequently, WTBA requests that DNR consider establishing a cap on the amount of fees an entity with multiple permits would have to pay.

> **Response:** The non-metallic mining industry has already been given a significant privilege by not having to pay an annual fee for internally-drained non-metallic mines.

We recommend that the structure/management of non-metallic mines be adjusted to become internally drained and then they would not be subject to an annual fee.

Specific Comments on Subchapter II

I6. Comment: p. 25, line 23. Conditional No Exposure. What is a "storm resistant structure"? Is a lean-to (roof with no sides) adequate for no exposure?

Response: A storm resistant structure must be able to stay in place during adverse weather conditions and be able to prevent contact with the material it covers and this may require protections from the side (not just directly over top of the material).

I7. Comment: p. 36, line 3. The code calls for annual composite sampling for all Tier 1 facilities, which is excessive and cost-prohibitive due to the inherent difficulties in storm water sampling. The DNR has collected enough data through the Industrial Permitting program application period in the mid-1990s to determine the extent of storm water pollution from various industries. A simple test should be sufficient such as a visual inspection to determine the amount of storm water pollution at each site.

Response: The Department requires only 2 annual samples to be taken at Tier 1 facilities but could require more sampling if there is a reasonable potential that the discharge may exceed a water quality standard.

Subchapter III: Construction Site Storm Water Discharge Permits

General Comments on Subchapter III

C1. Comment: Regarding authorized local program, the majority of the permits that the City of Green Bay would issue would not necessarily be DNR-linked projects, but they would be Dept. of Commerce projects. Without addressing that we don't really see a remedy for the overlap with Dept. of Commerce and the locals. DNR needs to go back and work with Dept. of Commerce to re-write the Memorandum of Understanding as far as how it's programs will work.

Response: In accordance with s. 101.1205, Stats., the Dept. of Commerce has jurisdiction over erosion control at public buildings and places of employment (commercial buildings). DNR will ask Commerce to allow authorized local programs to administer the construction site program on Commerce's behalf. If Commerce would support the authorized local program, we agree that the MOU would need revision in addition to possible Commerce code changes.

C2. As discussed on the TAC, there remains little incentive for local communities to become "Authorized Local Programs" under this rule. Key to making this work is the grants that DNR offers to urban nonpoint programs. While local ordinances can produce revenues, it is very difficult to cover actual program costs. In addition, educational programs and watershed-based planning are key to making local programs effective, but are not supported by permit fees. Current rules prevent local communities from using grant funds for local staff to carry out these activities due to local matching requirements.

The rule should also ensure that if a community becomes an "Authorized Local Program", that no costs would be incurred to conduct the permit application screening requirements under NR

216.415(7)(a). We were recently informed that there is a $1,500 annual fee to obtain access to the State's on-line database for historical property.

> **Response:** DNR can only issue grants for purposes and scope defined by legislation. The screening requirements under s. NR 216.415(7)(a) are already established by state and federal law and we can't change these requirements via revision of ch. NR 216. The $1500 fee is a state Historical Society policy.

C3. Comment: While we understand the rational for creation of authorized local programs to assure more effective compliance with construction site erosion control and storm water management requirements, we have several concerns. The DNR must be very careful in certifying and monitoring these local programs. It is very common for construction to start in the Milwaukee areas with no municipal approval of erosion control or storm water plans. We are also worried that DNR will not have effective timely notification of projects that could affect water quality until the project is over, and the DNR receives an annual report. The rule also states that local municipalities would have to be trusted to protect threatened and endangered species and historic properties (p. 42, lines 1-4). We believe that at the very minimum, the DNR should review and approve permits for construction projects that would impact the primary environmental corridor (as designated by the State or regional planning authorities), threatened and endangered species, or historic/archaeological resources.

> **Response:** DNR does not have resources to review all construction projects. If DNR needed to first screen/review projects prior to letting the authorized local program take them, that would undermine one of the primary goals of the authorized local program which is to use limited local and state resources efficiently. DNR intends to monitor authorized local programs via spot checks and complaint investigation as appropriate to evaluate the effectiveness of this approach in administering the program.

C4. Comment: I fully endorse these new and good rules (including NR 151 with performance standards). It is a wonderful thing to finally get storm water management into the public eye and do something about it. But I do urge some flexibility in the enforcement, maybe changing some of the standards to some degree.

What I see happening is through the NOI process, and particularly with post-construction requirements, in trying to achieve the 80% reduction you are going to get proliferation of a lot of small, almost unmanageable ponds that I fear will become a real problem with algae problems and other things. Good design and maintenance can negate some of that, but it's going to be where you get that subdivision coming in with 10, 20 lots—we have to get NOIs, we have to put in a wet pond to get the 80% because there is very little else that works. I'm hoping that some changes for more flexibility might happen. For instance, allowing dry ponds with diversions of higher flows. Perhaps being able to use the upper parts of the navigable stream or wetlands of a marginal quality. By being more flexible, we can do this good job much wiser, much better. Right now we follow the letter of the law.

> **Response:** We appreciate your support for the post-construction standards of ch. NR 151. However, NR 151 standards are not open for changes at this time. Since no specific changes were suggested for NR 216, no changes were made to NR 216 based on this comment.

C5. Comment: On the issue of site-specific verses watershed basis, which I understand is difficult to address in a rule, there should at least be some language in the rule that gives DNR the

ability to negotiate with the communities on a regional basis on a project-by-project basis. For example, in a built up area such as Green Bay, we may have a situation in a watershed that is built up and meets the requirement of the code in terms of construction erosion, but in terms of storm water management, it may be better for the city to pay a fee in lieu of permit development and apply it to an area in a developing watershed where it might be better utilized and provide better bang for the dollar.

There are also other situations where you could have a bigger bang for the buck. The City of Green Bay had a proposal from a group to work outside municipal boundaries on a wetland restoration project that we felt would have a very big impact on the water quality affecting the Baird's Creek basin. However, there was no incentive for the city to do so because we have our own issues within our municipal boundaries to deal with and with limited funding we couldn't justify going outside municipal boundaries. The rules should have the flexibility to negotiate that with other communities.

> **Response:** For existing developed urban areas, the municipal permit will allow the municipality to meet the 20% (year 2008) and 40% (year 2013) TSS standard on a regional basis across multiple MS4s. For new development, in-fill and reconstruction, the TSS standard must be met for each project site or as part of a regional treatment system in accordance with s. NR 151.003. For new development, each new project will need to meet a post-construction TSS standard of 80% before the runoff discharge into a navigable surface water. For in-fill and reconstruction, a post-construction TSS standard of 40% applies.

C6. Comment: We are at a point where there are overlapping regulations. Under ch. 30 regulations, we have one area in terms of 10,000 square feet of disturbance, which is really earmarked for construction site erosion control. And there are other overlapping programs. What's tying the hands of the communities—the City of Green Bay has a construction erosion control ordinance that's been on the books since 1991, but our ordinance cannot supersede the UDC. That's a problem—we don't agree with what's in the UDC as far as what is required for one- and two-family dwellings. It has an impact on our ability to enforce construction site erosion control.

> **Response:** DNR is aware of this issue. We have brought it to the attention of Commerce and would like them to revise the UDC to be consistent with state and federal erosion control and storm water standards because they currently are not adequate. DNR is also evaluating the integration of s. 30.19, Stats., grading permits with the NR 216 construction site permit.

C7. Comment: A separate subchapter in NR 216 should be created for transportation construction projects because of their unique nature. These projects are generally conducted by public entities. Also, the horizontal nature of this construction, which may go on for miles, can create different erosion control challenges than those faced in vertical construction. Because of these differences, the Department created a separate transportation construction subchapter in NR 151 that contains a procedure for transportation projects, which is applicable to transportation projects regulated under NR 216. This NR 151 process should be incorporated into NR 216.

NR 151.22(1)(a) requires that a transportation facility authority develop a design plan to meet the NR 151 performance standards. Pursuant to NR 151.22(2)(a), the prime contractor then develops an implementation plan. NR 151.22(1)(b) and (c) specifies that the transportation facility owner is to approve the implementation plan, and to administer and enforce the implementation plan.

NR 151.22(d) mandates that the transportation facility authority must verify in writing before accepting the completed project that the implementation plan has been satisfactorily completed. NR 151.22(3) goes on to provide that for projects regulated under NR 216, a single plan could be developed as long as it contains the components of both the design and implementation plans discussed above. This process is not reflected in NR 216 and should be incorporated into a transportation subchapter to avoid confusion and simplify the regulatory process.

> **Response:** The Department disagrees and doesn't believe that a separate subchapter in NR 216 for transportation facilities is warranted. A note was added to clarify that a ch. Trans 401 Erosion Control Plan (ECP) and Erosion Control Implementation Plan (ECIP) taken together is equivalent to the NR 216 erosion control plan.

C8. Comment: NR 216.456. Responsible Party. This provision exceeds the Department's statutory authority by attempting to impose responsibility for NR 216 on entities that do not have a construction storm water permit. This new provision provides: "(1) The permittee or landowner required to submit a notice of intent under this subchapter is responsible for complying with the requirements of this subchapter. (2) An operator shall comply with a requirement of this subchapter where the operator has a contract or other agreement with the landowner to meet the requirement."

Wis. Stats. s. 283.33(1) specifies that it is the "owner or operator" who is required to obtain the storm water permit. NR 216 was promulgated to implement that permitting requirement. It is the permit holder who is responsible for compliance with NR 216 requirements. The Department's proposed language, however, seems designed to expand the entities that are responsible for NR 216 compliance, regardless of whether they are a NR 216 permittee. NR 216.456(2) attempts to create a regulatory requirement to comply with a private contract. We question the wisdom of the DNR putting itself in the role of contract enforcer. Furthermore, this provision exceeds the Department's statutory authority by making non-permit holders responsible for NR 216 compliance. This provision should be removed.

> **Response:** Section 283.33, Stats., authorizes the Department to require the "owner or operator" to obtain storm water construction permit coverage. In other words, the law provides for potential joint and several liability of owners and operators. In most cases, the owner and the operator are the same person, but where the operator is an entity separate from the landowner, accountability for permit compliance sometimes gets compromised if only the landowner is subject to permit requirements, as is currently the rule. To correct this as efficiently as possible, rather than require the owner and operator to each obtain permit coverage for the same project, the approach taken in the proposed rule effectively exempts operators from the application process, but holds them, along with landowners, responsible for complying with the terms of the permit itself.

C9. Comment: While the law currently provides an exemption for silvicultural activities, other activities, including recreational trail development/ maintenance, would not be exempted. County governments are charged with administering snowmobile and ATV trails. NR 216 has the possibility of causing delays, extra administrative work and added expense to trail development without measurable improvement on storm water runoff.

County forests routinely use water quality best management practices on their projects, as referenced in the County Forest Comprehensive Land Use plans that statutorily govern the management on the individual county forests. In addition, ch. 30 permits and associated environmental assessments are already required for things such as stream crossings on a number

of trail projects. It appears there is considerable overlap in the various water regulations and permits. Additional regulations being imposed by DNR in response to federal requirements will further complicate trail projects.

It is our understanding that the proposed regulations would require a permit when disturbing more than one acre of ground while developing a new trail or maintaining an established trail. We have every intention of addressing runoff potential. We are also fully aware that DNR is developing these rules in response to federal requirements. In doing so, WCFA strongly voices the opinion that any such rules must not lead to delays or added expense to individual projects.

We are asking that relief be provided to the counties through an exemption to the rule that would allow counties to maintain and develop recreational trails in Wisconsin. The WCFA suggests the following alternatives:
1. Ideally, WCFA would propose a blanket statement in the County Forest Comprehensive Land use Plan in which the county would agree to use BMPs for any trail projects. This land use plan is statutorily required and identifies all the details of managing a forest. No permit or notice of intent would need to be issues.

2. Issue a blanket permit or NOI once each year to a county charged with maintaining and developing recreational trails in Wisconsin. Such a permit would include:

a. Development of a Notice of Intent General Permit that would fit the activity, as opposed to the Industrial Stormwater Discharge General Permit that would otherwise be required.

b. A requirement that the NOI General Permit reference that water quality BMPs are being used in maintenance and/or development of certain recreational trails within the state.

c. A requirement that the NOI General Permit would reference the County Comprehensive Land Use Plan, which is approved by the DNR.

d. A presumptive approval process so that counties could progress with projects unless the DNR responded within a certain time frame (e.g., 14 days).

The filing of the NOI General Permit would give the county authority to do the work as stated in the document over a twelve-month period. There should be no charge for this permit. This is no different from the ch. 30 permits, which also are free to municipalities when working with grant programs.

This General Permit would cover the entire recreational trail systems that are maintained/developed by the county, whether on land that is privately owned or owned by the municipality. The concern is that bicycle trails, cross country ski trails and other similar type trails need to also be covered by any general permit that will be issued.

> **Response:** We are required by federal law to require construction site permit coverage for recreational trail development, as there is no federal exemption. A county could include multiple trail construction projects that are part of a common plan of development under one notice of intent (application). Permit coverage under the construction site general permit does not require individual public notices and permit coverage is automatically conferred after 14-working day unless the Department has reason to withhold permit coverage. The Department is required by s. 283.33(9)(b), Stats., to charge permit fees to administer its permit program. Thus, application fees will be required based on the acreage of land disturbance for each NOI submitted. We believe that the submittal of an NOI for a common plan of development trail system, which generally receives automatic coverage within 14-working days, is not an onerous requirement.

C10. EPA has postponed until March 10, 2005 the requirement to obtain NPDES storm water permit for construction activities associated with oil and gas exploration, production, processing or treatment operations or transmission facilities where land disturbances are between 1 to 5 acres (see 68 FR 11325). The two-year postponement is intended to allow time for the EPA to analyze and better evaluate the impact of the permit requirements on the oil and gas industry; the appropriate BMPs for preventing contamination of storm water runoff resulting from construction associated with oil and gas exploration, production, processing or treatment operations or transmission facilities; and the scope and effect of 33 USC 1342(1)(2) and other storm water provisions of the Clean Water Act. We request that this deferment also be incorporated into recreated c. NR 216. In particular, we request the following language be added under section NR 216.42 Applicability: "Stormwater discharges resulting in disturbances between 1 and 5 acres of land from construction associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities will not be regulated under this rule until March 10, 2005."

Response: This federal delay has been added under s. NR 216.42(10).

C11. Under NR 216.42, routine maintenance for project sites that involve under 5 acres of land disturbance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility is not regulated. We conduct physical surveys of our natural gas pipeline on an annual basis and identify isolated segments along the pipeline system where the pipeline coating or the pipeline itself needs to be excavated, inspected, repaired and/or replaced. Up to 150 sites may be identified for inspection, repair and/or replacement in any year. The area of ground disturbance at any one of these sites is frequently equal to or greater than one acre but less than five acres. It is our understanding that these routine maintenance digs would not be regulated by the DNR, however, we would appreciate written correspondence from DNR confirming this interpretation.

Response: We have included the routine maintenance exemption language consistent with that in federal code. EPA has indicated that they will provide additional guidance on this requirement and we are interested in reviewing EPA's guidance on this issue before establishing our own on this issue.

C12. Comment: The rule makes some attempt at integrating state and local programs by allowing local governments to become "authorized" local programs for the purposes of construction site management. § NR 216.415. However, the current rule may not provide sufficient incentives for this to occur. We request the Department review this aspect of storm water control after two years, and, if this provision is not being widely utilized, the Department re-evaluate whether additional incentives can be developed for this program.

Response: DNR will re-evaluate the authorized local program provision after a few years to determine if additional changes are needed.

C13. Comment: FMR supports the change in fee structure that ties application fees to the amount of land disturbance. However, we would like to see caps in impervious surface and/or performance standards tied to the amount of impervious surface created by construction. For example, North Carolina recently enacted rules, as part of their conformance with EPA's Storm Water Phase II guidance, that impervious surface not exceed 12 percent of shoreland lots and 24 percent of inland lots.

Response: Shoreland area requirements are contained within ch. NR 115. That code is currently undergoing revisions and impervious area caps are being considered for shoreland areas. There are storm water management practices that can be used to offset the negative impacts that high density/impervious areas have. The Department does not believe that impervious area caps should be required for inland areas as that would encourage urban sprawl, which leads to an even greater amount of land being impacted by development.

C14. Comment: NR 216.42, Applicability. We are concerned about the exemption for "pasturing or yarding of livestock" under the agriculture exemption. Even though this exemption states that construction of structures would not be exempt from NR 216, this section needs further clarification regarding control of industrial hog or cow factories of a certain size. It is our understanding that recent research into the Milwaukee crytptosporidium outbreak of 1993 links that disaster to runoff waste from an animal factory.

Response: The operation of livestock facilities is federally exempt from storm water regulations so they are not able to be regulated under ch. NR 216. However, feeding operations are regulated under ch. NR 243, Wis. Adm. Code (Animal Feeding Operations).

C15. Comment: We are uncomfortable that a landowner is authorized to discharge from a construction site automatically 14 days after the DNR has received the notice of intent. This short time period would also make it difficult for there to be any public input regarding storm water permits. From past experience, municipalities, the DNR and MMSD make it extremely difficult if not impossible for the public to comment during this process.

Response: The 14-working day automatic approval is equivalent to about 3 calendar weeks and this time is allowed for DNR staff to screen the NOI and potentially request plans for a formal review of the project. Given the number of NOIs and the DNR's limited resources, DNR is unable to public notice projects prior to them being authorized coverage under the general construction site storm water permit. Consistent with state and federal law, the general permit is public noticed prior to issuance/modification and public hearings have been conducted prior to each reissuance that this permit has experienced.

C16. Comment: While the revisions include a certification statement by the contractor that "all temporary erosion and sediment control measures have been removed", it is our experience that this very rarely occurs, leading to visual impairment and recreational hazards. Perhaps contractors could be required to submit before and after pictures as part of their notice of termination.

Response: We agree that temporary erosion controls such as silt fences are not always removed when they should be. However, we don't believe that adding pictures to the notice of termination (NOT) will help with this issue. We currently have a difficult time getting permittees to send NOTs to us and adding a picture requirement will result in the Department having an even lower percentage of NOTs returned. However, when we revise our termination letter we intend to put in a reminder that temporary erosion control measures need to be removed when they are no longer needed when the site is stabilized from erosion.

C17. Comment: The City of Green Bay, Town of Lawrence and the Villages of Ashwaubenon and Hobart are located adjacent to Austin Straubel International Airport. This spring Brown County updated their zoning code pertaining to "Airport Zoning District" that included an open water restriction that does not allow "within 10,000 feet of the end of a runway, detention/retention ponds or any other body of water with a surface area greater than 500 square feet." The open water restriction was proposed to limit the attraction of waterfowl.

The outcome of a meeting between DNR, USDA and the surrounding communities was that we have two government agencies establishing rules in direct conflict with each other. DNR requires wet ponds to be installed for 80% reduction of pollutant levels and the FAA tells the airport to limit open water. The Village of Ashwaubenon is requesting that the DNR review NR 216 rule for communities surrounding airports. Can a dry pond be used in areas near an airport? The steadfast requirement for wet ponds puts communities surrounding airports in a no win situation.

> **Response:** Our performance standards do not require wet ponds and there are other measures that can be taken/utilized to meet the 80% TSS standard to the maximum extent practicable. The Department is working with DOT Bureau of Aeronautics to better define what is expected within airport runway areas.

Overlap with other permits

C18. Comment: The rule does not address the broader question of integration with other state erosion control programs. Currently, there is a multitude of state programs regulating construction site discharges. Since this rule now affects sites down to one acre, more should be done to integrate the requirements of this code with chapter 30, and the programs of other agencies.

C19. Comment: Many of the comments stated that NR 216 continues a system of overlapping local, county and state regulations applicable to the grading industry and urged that the rule be modified to address this problem. The commenters made the following points:

- Grading is subject to more than 6 different sets of regulations, including NR 216
- This rule revision is DNR's opportunity to eliminate that needless duplication
- Of particular concern is the overlap with WI Ch. 30.19 grading permits
- Applying for 6 permits to do the same thing does not improve the environment, it just wastes time.
- The delays caused by all of this paperwork will increase the cost of a single-family home lot by 10-12% in many areas of Wisconsin.
- NR 216 should merge all of these regulation into one permit
- It is more important than ever that these overlaps be eliminated now, as this regulation applies to hundreds more communities and thousands more projects.

NR 216 is an effective and "user-friendly" regulatory program. The development industry is comfortable with the methods and procedures of NR 216. We would urge the department to modify other regulatory programs, especially ch. 30.19 grading permits into NR 216.

> **Response:** The Department has taken note of the many requests to simplify the overlapping erosion control permit requirements. The Department is currently in the process of trying to streamline these permits including the possibility of integrating the s. 30.19, Stats., grading permit requirements into the NR 216 construction site general permit.

Specific Comments on Subchapter III

C20. Comment: There still is no definition for "precipitation event" even though that is a referenced situation in NR 216.48(4)(a)(2). I still firmly believe that if you are requiring an inspection after a 0.5-inch precipitation event it really needs to be defined. I submit this definition as a possibility: "precipitation event" shall be the total amount of precipitation recorded in any contiguous 24-hour period.

> **Response**: Your suggested definition for precipitation event has been added under s. NR 216.48 (4) (a) 2.

C21. Comment: NR 216.48(4)(a)(2)(c). I propose that requiring inspection reports to be maintained "at the construction site" be changed to read "at the construction site **or at a website with 24/7 access by the authorized agency**". There are a number of small job sites that do not have job trailers at them. A lot of times there simply is not a secure place to store these records. With the website provision, the regulatory agency wouldn't even have to wait the 5 days the permit holder has to produce the requested records before doing a review of the site. With the technical abilities we have these days there is no reason an Internet option is not offered.

> **Response:** The rule was changed to allow the option of maintaining inspection record availability on a website.

C22. Comment: NR 216.415(6)(c). p. 41, line 28. Suggest changing this to 14-working days to be consistent with state requirement.

> **Response:** This timeline was discussed with the DNR's external advisory committee. The municipal advisors on the committee did not feel that a 14-working day timeline was something that they would be able to work within. Since the Department wants to encourage municipalities to become authorized local programs and wants this timeline to be acceptable to those that might consider becoming authorized, the Department proposes a 30-day timeline which the municipalities felt was acceptable. Thus, no change was made to the 30-day timeline.

C23. Comment: NR 216.415(4). p. 40, line 35. State Coverage. "shall comply with requirements of departments permit" should be changed to say "requirements of authorized local permit".

> **Response:** No change has been made based on this comment. The applicant will be issued coverage under the state permit and is required to be in compliance with the state permit which is required by state and federal law. The authorized local program will enforce its ordinance(s) which are to be as stringent as the state permit. Compliance with the local program requirements will assure compliance with the state permit.

C24. Comment: NR 216.42(2). p. 46, line 20. Performance Standards. NR 151 dictates 80% removal of TSS from construction sites compared to no controls. However, determining the efficiency of construction site BMPs operating in series can be difficult to demonstrate the 80% removal without detailed modeling. Suggest adding the words "using quality modeling (SLAMM) is not needed at construction sites but is needed for post-construction sites as described in NR 151.

Response: The DNR has established some erosion control and sediment control technical standards whereby following those standards, modeling would not be required including the erosion control matrix for transportation facilities. The DNR is currently working to update several more technical standards for erosion and sediment control. However, depending upon the type of erosion and sediment control used upon a construction site, modeling may be necessary to demonstrate its effectiveness, especially where the Department has not developed a technical standard for a particular erosion or sediment control device.

EPA Region 5 Comments

Comments on Introductory sections (NR 216.001 - NR 216.005)

E1. NR 216.001: Change "maximum extent practicable" to a more general standard. MEP is not applicable to industrial facility permits.

> **Response:** This change has been made.

Comments on Municipal Storm Water Discharge Permits (NR 216.01 - 216.10)

E2. NR 216.021(4): Include the phrase “unless the municipal separate storm sewer system is ”after “decennial census” to clarify there are some MS4s that could be exempted from permit coverage.

> **Response:** This change has been made.

E3. NR 216.023(d): Reference to "non-point source impaired water" is inconsistent with provision in 40 C.F.R. 122.32(d)(2): "If you discharge any pollutant(s) that have been identified as a cause of impairment **of any water body** to which you discharge, storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established 'total maximum daily load'(TMDL) that addresses the pollutant(s) of concern [emphasis added]."

NR 216.024(d): See comment on NR 216.023(d) above.

> **Response:** Sections NR 216.023(d) and 216.024(d) references to impaired waters have been changed to be consistent with the federal referencing of these waters.

E4. NR 216.03: We note that the federal deadline for facilities to be covered under the Phase II permit requirements was March 10, 2003. We recommend that the rules reflect this federal regulatory deadline. The fact that facilities under these draft regulations would not have effective permit coverage until a year or more after the federal deadline could create legal vulnerabilities for the state program.

> **Response:** A note was added to clarify that the federal application was to be submitted by March 10, 2003.

E5. NR 216.06: The draft regulations in section 216.06 provide permit coverage without requiring the regulated facility to meet all of the federal permit requirements, as such the draft regulations in these two sections are less stringent than the federal program. Under these draft regulations, an MS4 could turn in a list of programs already being carried out without having to show its actual or planned activities to "develop, implement, and enforce" the six minimum control measures in their storm water management plan required by the fed permit requirements. We discussed and strongly recommend that the permittees be held to the application requirements and five-year time frame for putting the completed bmps in place, as set out in 40 C.F.R. 122.34. As such, NR 216.06(1) - (4) should be deleted. The introductory language can be used in the revised NR 216.07. Also, language regarding existing programs can be used as a note in the revised section NR 216.07 as MS4s should assess which programs already meet or partially meet the requirements of 122.34.

Response: This section has been revised to require that the application include the proposed BMPs that the applicant intends to develop, implement and enforce within 5 years to comply with the federal 6 minimum control measures. The 5-year time frame in included under s. NR 216.07(9).

E6. NR 216.07: The draft regulations allow the permittee to acquire permit coverage without having to meet the federal requirement of having the six bmps in place prior to permit coverage. The permittee should be responsible for providing the necessary plans and time frames (within the program requirements) for putting the bmps in place.

Response: The rule has been changed to require that the BMPs be implemented (put in place) within 5 years after initial permit coverage. The Department intends to put a compliance schedule within the permits to require that certain BMPs be implemented in less than 5 year.

E7. NR. 216.07(1): you may wish to add a note, especially in light of our discussion, that the permittee can tailor the public education and outreach requirement depending upon the specific circumstances. See 40 C.F.R. 122.34(b)(1)(ii).

Response: Such a note was added.

E8. NR. 216.07(2): to better track the federal requirement, you should indicate that the public involvement and participation program should at a minimum comply with state/tribal/locally applicable (as appropriate) public notice requirements. See 40 C.F.R. 122.34(b)(2).

Response: This minimum requirement was added.

E9. NR 216.07(3): The federal regulations at 40 C.F.R. 122.34(b)(3)(ii)(B) require that the regulatory authority "To the extent allowable under State, Tribal or local law, effectively prohibit through ordinance, or other regulatory mechanism, non-storm water discharges into your storm sewer system and implement appropriate enforcement procedures and actions[.]" This section seems a bit vague, as it references generally "The implementation and enforcement of a legal authority to prevent illicit discharges." (NR 216.07(3)(b)).

Response: This requirement was added.

E10. NR 216.07(4): This section should reference that it applies to construction sites of 1 acre or more, or sites less than one acre that are part of a larger common plan of development and sale. See 40 C.F.R. 122.34(b)(4)(i). This section should also control waste that could cause water quality impacts and include procedures for receipt and consideration by the public. See 40 C.F.R. 122.34(b)(4)(ii)(C) and (E)

Response: This section of the rule was revised to address these issues.

E11. NR 216.07(4)(a): The federal regulations require not only a program to enforce construction storm water runoff controls, but also **expressly require sanctions**. We are unclear if the draft program is intended to include sanctions. See 40 C.F.R. 122.34(b)(4)(ii)(a).

Response: This section was clarified to make it clear that sanctions are required.

E12. NR 216.07(5) This section should reference that it applies to construction sites of 1 acre or more, or sites less than one acre that are part of a larger common plan of development and sale. See 40 C.F.R. 122.34(b)(5)(i).

Response: This reference was added.

E13. NR 216.07(6): The federal regulations specifically require that there be a training component, which does not appear to be part of the draft regulation. See 40 C.F.R. 122.34(b)(6)(i).

Response: The requirement for a training component was added.

E14. NR 216.07(7)(c) and (d): Remove references to "known" municipal storm sewer system outfalls. The federal regulations at 122.34(b)(3)(ii)(A) require mapping of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls."

Response: The word “known” was removed.

E15. NR 216.07(9): The compliance schedule, because it is open-ended, is less stringent than the federal regulations. The compliance schedule provision in the draft regulations should reference the 5-year time frame for implementing the storm water management plan. See 40 C.F.R. 122.34(a).

Response: The 5-year time frame for implementing the storm water management plan was added.

E16. NR 216.08: The draft regulations vastly expand the universe of waivers from what is provided in the federal regulations, allowing any facility for any reason to opt out at DNR's discretion. The waiver provision is inconsistent with the federal regulations, which provide waivers in very limited circumstances, see 40 C.F.R. 122.32(c)-(e).

Response: Section NR 216.08 was removed, as this is not allowed under federal regulations. The Department is including the 40 CFR 122.32(d) waiver for MS4s in urbanized areas serving less than 1000 people under s. NR 216.023.

Comments on Industrial Storm Water Discharge Permits (NR 216.20 - NR 216.32)

E17. NR 216.21(2)(b)3.a.: "add "located on the site of such operations" at the end of the last sentence to reflect the provision in 40 C.F.R. 122.26(b)(14)(iii).

Response: It has been added.

E18. NR 216.21(2)(b)(2m)[make sure this numbering is correct]:

Response: The number of this section was revised.

E19. NR 216.27(3)(a): change "individual" to "individual(s)"

Response: We have modified the section to have all responsible individuals listed.

Comments on Construction Site Storm Water Discharge Permits (NR 216.41 - 216.55)

E20. NR 216.42: This section should reference the 1 acre or more requirement/less than one acre where it is part of a larger development or sale or reference definition of construction site in NR 216.002.

> **Response:** This section has been retitled to identify that it applies to one or more acres of land disturbance. The definition of construction site includes the full definition of what areas of land disturbance constitute a regulated construction site.

Abbreviations of Organizations and Businesses

LWM – League of Wisconsin Municipalities
MEG – Municipal Environmental Group (Wastewater Division)
SEWRPC – Southeastern Wisconsin Regional Planning Commission
WBA – Wisconsin Builders Association
WCA – Wisconsin Counties Association
WTBA – Wisconsin Transportation Builders Association